No. 25

IN THE

Supreme Court of the United States

October Term, ~~1948~~ 1949

JOHN WALTER OAKLEY, JR., - - Petitioner,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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OPINION BELOW.

The opinion of the District Court is not officially reported. The opinion of the Court of Appeals for the Sixth Circuit (OR. 28-31) is reported in 170 F. 2d 1008.

COUNTER-QUESTION PRESENTED.

The only substantive question presented is whether or not petitioner's seniority at Corbin should date from July 1, 1945, or from July 18, 1946.

STATEMENT.

When petitioner, Oakley, entered military service he was employed by respondent as a machinist at Loyall, Ky. (OR. 5), and, under the bargaining agreement covering his employment with respondent, his seniority was confined to that point. His seniority dated from the time he started to work at that point (OR. 8). While on furlough in the military service, there was a force reduction at Loyall which resulted in machinists with more seniority than petitioner being laid off and placed on furlough (OR. 5). Had petitioner not been in the military service on July 1, 1945, he would have been laid off at that time (OR. 6). When he returned from military service in 1946, petitioner was restored to the position he left plus cumulated seniority at Loyall, but there had been such a change in the circumstances that it was impossible to give him actual employment at Loyall (OR. 6). To have given him employment at Loyall would have been unreasonable and would have given him a preference over machinists senior to him (OR. 5). Petitioner recognized that fact and applied "for a job as machinist at Corbin" in accordance with the "bargaining agreement" (OR. 5-6). That agreement provided that men laid off in force reduction could, if they so

desired, apply for transfer, and be transferred to any point where men were needed, with the privilege of returning to the home station when force is increased (OR. 7-8). In applying for the transfer to Corbin, petitioner asked respondent to grant to him seniority dating at Corbin as of July 1, 1945, on the ground that had he not been in military service he would have accepted employment at Corbin at that time. Under the bargaining agreement, seniority is confined to the point employed and dates from the time the employee starts to work at that point (OR. 8). Petitioner was transferred to Corbin and began working at that point the day the application for transfer was received by respondent (OR. 6).

The only question presented by petitioner's complaint filed in the District Court was whether or not petitioner's seniority at Corbin should date from July 1, 1945, the day he could have applied for transfer to that point had he not been in the military service, or date from July 18, 1946, the first day he worked at Corbin after applying for transfer. Petitioner now ignores that issue and presents to this Court questions which are not germane to the question of petitioner's seniority rights, the only substantive question at issue.

The facts in this case are quite simple and are not in dispute. Respondent, at the time it served its answer, also served its request for admissions (OR. 5-9). All of its requests were admitted except those denied because of insufficient knowledge, and the admissions thus denied were proved by affidavit (OR. 16) filed with respondent's motion for summary judgment (OR.

15) almost four months before the action was dismissed by the District Court.

The record clearly shows that petitioner was asking for a seniority standing at Corbin not accorded to non-veterans, and that he bases his claim to that super-seniority, or preferred standing, on the provisions of Section 8 of the Selective Training and Service Act of 1940, as amended (50 U.S.C. Appendix 308).

The District Court found that more than one year had elapsed since the date of petitioner's restoration of employment and dismissed the action as moot (OR. 24). The Court of Appeals affirmed the District Court on the ground that the statutory period of one year had elapsed; that under the provisions of the Selective Training and Service Act of 1940 petitioner was not, after that period, entitled to the preferred standing or super-seniority he claimed (OR. 30).

SUMMARY OF ARGUMENT.

Respondent opposes this petition on the following grounds:

I. Petitioner was fully restored to his former position plus cumulated seniority; was not entitled to the seniority at Corbin claimed by him, and, the judgment of the District Court being correct, the petition should be denied.

II. Petitioner's claim to seniority at Corbin of a prior date to the day he first worked at that point, is a claim to super-seniority or preferred standing over

non-veterans, and any possible right to such super-seniority or preferred standing terminated with the expiration of the one-year statutory period.

ARGUMENT.

I. Petitioner Was Fully Restored to His Former Position Plus Cumulated Seniority; Was Not Entitled to the Seniority at Corbin Claimed by Him, and, the Judgment of the District Court Being Correct, the Petition Should be Denied.

It is not denied that petitioner was restored to his old "position" or seniority at Loyall (OR. 6, 16). That restoration gave him the seniority he had before entering military service, plus the seniority he accumulated while in military service. He first began working at Loyall on July 6, 1943. He entered military service May 7, 1944. Upon his return he was given seniority at Loyall from July 6, 1943, the same seniority dating he had at the time he entered military service. It is admitted that during his absence there had been such a change in circumstances that it was impossible to give him work at Loyall, and that to give him work at Loyall would have been unreasonable and would have given him a preference over senior machinists (OR. 5, 6). Under the admitted facts he was not entitled to work at Loyall as long as senior machinists were laid off at that point. Under the Selective Training and Service Act of 1940, he was entitled to his old seniority at Loyall plus cumulated seniority, and that is exactly what was given him. He was, and still is, entitled to

be recalled to work at Loyall in accordance with that seniority. In *Fishgold* v. *Sullivan Drydock & Repair Corpn.*, 328 U. S. 275, 287, 66 S. Ct. 1105, this Court had before it that question and said:

> "The 'position' to which the veteran is restored is the 'position' which he left plus cumulated seniority. Certainly he would not have been discharged from such position and unable to get it back, if at the time of his induction into the armed services he had been laid off by operation of a seniority system. Plainly he still had his 'position' when he was inducted. And in the same sense he retains it though a lay-off interrupts the continuity of work in the statutory period. Moreover, a veteran on his return is entitled to his old 'position' or its equivalent even though at the time of his application the plant is closed down, say for retooling, and no work is available, unless of course the private employer's 'circumstances have so changed as to make it impossible or unreasonable' to restore him. §8(b) (B). He is entitled to be recalled to work in accordance with his seniority. His 'position' exists though no work is then available. The slackening of work which causes him to be laid off by operation of a seniority system is neither a removal or dismissal or discharge from the 'position' in any normal sense. Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework

of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year."

The status of petitioner when he returned from military service was that of a machinist laid off at Loyall because of a reduction in forces, plus cumulative seniority at that point. He was therefore given full "protection within the framework of the seniority system" in effect upon respondent's railroad. In addition to the rights given petitioner under the Selective Training & Service Act, the bargaining agreement under which he works gave him certain privileges of transfer. Rule 26 (OR. 7, 8) of that agreement reads:

"Rule 26—Transfer of Laid-Off Employes.

"26(a) While forces are reduced, if men are needed at other points, furloughed men will be given preference to transfer, with privilege of returning to home station when force is increased, * * * seniority to govern.

"26(b) An employee laid off in force reduction desiring to secure employment under this rule shall notify his foreman in writing and furnish his craft General Chairman copy of the letter."

Neither the lay-off at Loyall nor the bargaining agreement gave petitioner an automatic transfer to Corbin or to any other point. Under the bargaining agreement, petitioner was required to apply in writing for the transfer to Corbin and there must have been need for men at that point before the transfer would be made. It was under the provisions of Rule 26 that

petitioner applied for transfer to Corbin. His application so states (OR. 5-6). It was under this Rule that his request was granted, and petitioner at this time retains his old position, or seniority, at Loyall.

Upon his transfer to Corbin his seniority at that point was controlled by Rule 28 of the bargaining agreement, the pertinent part of which is as follows:

> "28(a) Seniority of each employe covered by this agreement will begin from the date and time the employe starts to work.
>
> "28(b) Seniority of employes in each craft covered by this agreement shall be confined to the point employed for those who perform work as per special rules of each craft in the various departments of the railroad as follows:
>
> "Machinists * * *."

(OR. 8. Under that Rule it is clear that petitioner's seniority at Corbin dated from July 18, 1946, the day he first worked at that point after being transferred. To establish seniority at Corbin petitioner had to begin working at Corbin. The Selective Training and Service Act of 1940 did not create a new seniority for petitioner, it simply protected what seniority he had, plus that which he accumulated while in military service. It gave him no step-up or gain in priority. The non-veterans who were cut off on July 1, 1945, because of the force reduction at Loyall, did not apply for transfer to Corbin (OR. 5, 7). Had they made such application their seniority at Corbin would have begun on the day they first worked at that point after the transfer. The seniority given to petitioner at Corbin began

on the day he first worked there, as provided by Rule 28, *supra*.

In Fishgold's case, *supra*, this Court said:

> "He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more."

The admitted facts which the District Court had before it when the action was dismissed, show clearly that petitioner was fully restored to his old position without loss of seniority upon his discharge from the armed services. He was given all of the rights to which he was entitled under both the Selective Training and Service Act and the Bargaining Agreement. He was not entitled to more.

Under the facts shown by admissions and affidavit, the judgment of the District Court is correct and should be affirmed, regardless of the ground upon

which the Court relied. As was said in *Helvering* v. *Gowran*, 302 U. S. 238, 245, 58 S. Ct. 154:

> "In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

II. Petitioner's Claim to Seniority at Corbin of a Prior Date to the Day He First Worked at That Point Is a Claim to Super-Seniority or Preferred Standing Over Non-Veterans, and Any Possible Right to Such Super-Seniority or Preferred Standing Terminated With the Expiration of the One Year Statutory Period.

In *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 67 S. Ct. 982, this Court had before it the question of the "duration of the veteran's restored seniority standing" and said:

> "We find it unnecessary therefore to pass upon petitioners' position in this case, namely, that all protection afforded by virtue of §8(c) terminates with the ending of the specified year. *We hold only that so much of it ends then as would give the reemployed veteran a preferred standing over employees not veterans having identical seniority rights as of the time of his restoration.*" (Emphasis supplied.)

Non-veterans who are cut off by reduction in forces are only entitled to seniority at the point to which they transfer from the day they begin working at that point. It is apparent that if petitioner is given a seniority dating at Corbin as of July 1, 1945, long

before he began working at that point, and that if the seniority of non-veterans at that point dates from the day they first began working there, then petitioner would be given a super-seniority or preferred standing over employees who are not veterans. That is exactly what he requested when he made application for transfer and which he now claims. It is also exactly what this Court said in the *Whirls* case he was not entitled to. To emphasize this point we again quote from the opinion in that case:

> "But if this extraordinary statutory security were to be extended beyond the statutory year, the restored veteran would acquire not simply equality with nonveteran employees having identical status as of the time he returned to work. He would acquire indefinite statutory priority over nonveteran employees, a preferred status which we think not only inharmonious with the basic *Fishgold* rationalization, but beyond the protection contemplated by Congress."

When petitioner entered military service his seniority was confined to Loyall. He had no fixed or absolute right to transfer to Corbin, or to seniority at Corbin. His transfer there depended upon his making application for transfer, and there being a need for men at Corbin. His seniority there depended upon the time he began working there. He made the application when he returned from military service and says that he would have made it on July 1, 1945, the day the lay-off occurred at Loyall, had he not been in military service. Respondent recognizes that if peti-

tioner had been working at Loyall at the time the forces were reduced he might have applied for transfer to Corbin on July 1, 1945; that he might have been transferred, and that he might have established seniority at that point as of that date. However, the Selective Training and Service Act cannot be construed as granting to him a seniority which he *might* have obtained had he been working on the job instead of being in military service. *Fishgold* v. *Sullivan Drydock & Repair Corpn., supra; Raulins* v. *Memphis Union Station Co.,* Sixth Circuit, 168 Fed. 2d 466; *Harvey, et al.* v. *Braniff International Airways,* Fifth Circuit, 164 Fed. 2d 521; *Hewitt* v. *System Federation No. 152,* Seventh Circuit, 161 Fed. 2d 545.

Even if the Selective Training and Service Act gave petitioner the preferred standing or super-seniority he claimed over non-veteran employes, which respondent denies, that standing terminated at the end of the one-year statutory period, *Whirls* case, *supra.* The Court of Appeals in the instant case has correctly applied the *Whirls* case, saying (OR. 30):

> "Appellant (petitioner) bases his right to the seniority claimed squarely upon the terms of the statute. He was entitled to restoration to employment without loss of seniority for one year after he was taken back into the employ of the company. That period, however, having had elapsed after his restoration to employment, he was not entitled, under the provisions of the law, to the preferred seniority standing which he claimed."

The only question before the District Court on September 12, 1947, was whether petitioner was entitled to the claimed super-seniority or preferred standing (seniority at Corbin from July 1, 1945). When it appeared that the statutory period for the protection of that preferred standing had expired, if such protection was in fact given by the statute, which respondent denies, the Court quite properly dismissed the case as moot. Petitioner makes no claim for loss of time, or that he was damaged in any way during that one-year period.

CONCLUSION.

Even if it is determined that the writ of certiorari should be issued in case No. 579, John S. Haynes v. Southern Railway System, it should be denied in the instant case, No. 578. All of the facts in the instant case were before the District Court and the Court of Appeals. Both Courts found that those facts did not entitle petitioner to the seniority he claims. A re-examination of those facts requires the same conclusion. No good purpose could possibly be served by a granting of the writ in this case.

We respectfully submit that the petition for writ of certiorari should be denied.

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